

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

TRANSCARE NEW YORK, INC.
Employer

Case No. 29-RC-11762

and

INTERNATIONAL ASSOCIATION OF EMTS AND
PARAMEDICS, NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, SEIU LOCAL 5000,
Petitioner

TRANSCARE NEW YORK, INC.
Respondent,

Case No. 29-CA-29632

and

INTERNATIONAL ASSOCIATION OF EMTS AND
PARAMEDICS, NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, SEIU LOCAL 5000,
Charging Party

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Respondent/Employer.

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Charging Party/Petitioner.

DECISION

Statement of the Case

Steven Fish, Administrative Law Judge: Pursuant to charges and amended charges filed in Case No. 29-CA-29632 by International Association of EMTS and Paramedics, National Association of Government Employees, SEIU Local 5000, herein called the Union or Petitioner, the Director for Region 29 issued a Complaint and Notice of Hearing on August 11, 2009¹ alleging that TransCare New York, Inc., herein called Respondent or TransCare, violated Section 8(a)(1) of the Act by engaging in various acts of surveillance and creating the impression of surveillance in April, May and June 2009. On February, 18, 2010, the Acting Director issued a Supplemental Decision on Objections, Order Consolidating Cases and Notice

¹ All dates hereinafter referred to are in 2009, unless otherwise indicated.

of Hearing, in which he consolidated Case No. 29-RC-11762 with the above unfair labor practice complaint, and in which he overruled many of the objections filed by Petitioner to the election and directed a hearing on Objection A.1, Objection A.3 to the extent that it pertains to the Brooklyn Hospital polling site and Objection A.7. The hearing on the Consolidated Complaint and Objections was held before me in Brooklyn, NY on April 6, 7, 8 and 9.² Briefs have been filed and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I issue the following:

Findings of Fact

I. Jurisdiction and Labor Organization

Respondent is a corporation with its principal office and place of business in Brooklyn, NY, where it is engaged in the medical transportation business providing critical care, interfacility transport, advanced life support transportation (ALS), basic life support transportation (BLS), 911 personnel and ambulette and paratransit transportation in the New York City area. During the past twelve-month period, Respondent derived gross annual revenues valued in excess of \$500,000 and provided services valued in excess of \$50,000 directly to customers within the State of New York, which customers in turn, meet the Board's direct standard for the assertion of jurisdiction.

Respondent admits, and I so find, that at all times material herein, it has been an Employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I so find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Representation Case

The Union filed its petition on June 19 seeking an election of TransCare employees in a unit of "911 Ambulance EMTs and Paramedics employed in TransCare New York, Inc.'s NYC 911/EMS operation." Subsequently, a representation hearing was held, in which primarily unit issues were litigated. On October 9, the Director issued a Decision and Direction of Election in a unit of "All full-time and regular part-time emergency medical technicians ("EMTs") and paramedics employed in the Employer's New York City 911/EMS Division, but excluding all EMTs and paramedics employed in the Employer's Ambulance Transport Division, Special Operations Division and Westchester County 911/EMS Division, all other employees, dispatchers, ambulette drivers, guards, managers and supervisors as defined in the Act."

Pursuant thereto, an election was conducted by mail and manual ballots between

² On July 29, 2010, the Board issued a Decision on Review and Order in the instant case (355 NLRB #56), in which it granted in part the Petitioner's Request for Review, finding that portions of Petitioner's Objection A.3 dealing with alleged surveillance at Beth Israel, Montefiore and Mt. Sinai sites raised sufficient issues warranting a hearing. The Acting Director had already directed a hearing concerning similar allegations at Brooklyn Hospital, which were heard as part of this case.

The Board remanded the matter to the Director for appropriate action. On September 1, 2010, the Petitioner requested withdrawal of the remaining portion of Objection A.3 (i.e. the matters covered in the Board's remand). Accordingly, the Acting Regional Director approved the request to withdraw this portion of Objection A.3 by order issued on September 9, 2010.

November 10 and 24.

The Tally of Ballots issued on November 30 revealed the following results:

5	Approximate number of eligible voters	362
	Number of void ballots	3
	Number of ballots cast for the Petitioner	99
	Number of votes cast against participating labor organization	127
	Number of valid votes counted	226
10	Number of challenged ballots	14
	Number of valid votes counted plus challenged ballots	240

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes cast have not been cast for the Petitioner.

15 On December 7, the Petitioner filed timely objections to conduct affecting the results of the election.

20 As noted above, the Acting Director issued a “Supplemental Decision on Objections...on February 18, 2010 overruling some objections and sending others to hearing to be consolidated with the unfair labor practice complaint.

Objection A.1 filed by Petitioner alleges as follows:

25 Objection A.1:

In this objection, the Petitioner alleges:

30 The Board issued a Complaint against TransCare for engaging in unlawful surveillance and intimidation of employees. The Employer’s illegal activity continued throughout the campaign and election. After the Complaint issued and immediately prior to the election, TransCare supervisors continued closely to monitor and intimidate employees who attempted to speak with the union by coming into areas they did not normally frequent when employees were speaking with union representatives. Supervisors ordered employees to leave areas where they were allowed to be when they were trying to speak with the union.

45 The Acting Director’s report asserted that Petitioner’s offer of proof did not set forth any evidence in support of Objection A.1 and that the independent evidence did not uncover any such evidence. However, the report made reference to the unfair labor practice complaint, which did contain allegations of unlawful surveillance and creating the impression of surveillance that occurred during the months of April, May and June, and involved conduct by specific supervisors, namely Shannon Greaves, Director of 911 Service Division; MaryAnn Sawyer, Assistant Manager of 911 Service Division; Jackie Felz, Site Supervisor; Michele Cohen, Site Supervisor; and Carrie Boyd, Citywide Evening Supervisor.

The report further found that there was no specific evidence placing the allegations of the Complaint within the critical period commencing on June 19.

However, the report noted that the surveillance of employees alleged in the Complaint can be both an unfair labor practice and objectionable conduct warranting the direction of a second election.

The report then concluded as follows:

As a general rule, the Board does not consider instances of pre-petition conduct as a basis upon which to set aside an election. *Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961). However, the “*Ideal Electric* rule does not preclude consideration of conduct occurring before the petition is filed where...such conduct adds meaning and dimension to related post-petition conduct.” *Dresser Industries, Inc.*, 242 NLRB 74 (1979) (citing *Stevenson Equipment Company*, 174 NLRB 865, 866 n.1 (1969)). In *Dresser Industries*, the Board held that “the single violation of Section 8(a)(1) of the Act which occurred during the critical pre-election period [was] but an extension of Respondent’s consistent pattern of antiunion conduct...the pre-petition conduct...[lent] additional meaning to [the mine foreman’s] unlawful statements” shortly before the election. *Dresser*, 242 NLRB at 75.

In the instant case, the Complaint sets forth conduct occurring shortly before the critical period, and possibly (if the “dates presently unknown in June” were on or after June 19), within the critical period. The conduct alleged in the Complaint could “add meaning and dimension to related post-petition conduct,” including the post-petition conduct alleged in Objections A.3, A.7, and B.7, on which I am directing a hearing in the instant case.

Accordingly, I direct that Objection A.1 be consolidated with the Complaint and Notice of Hearing in Case No. 29-CA-29632, to be heard by an Administrative Law Judge.

III. TransCare’s EMS Operations

TransCare contracts with a number of hospitals in New York City, wherein it provides ambulance services to hospitals under the city’s 911 program. The hospitals serviced by TransCare are Montefiore, Einstein, Bronx-Lebanon, St. Barnabas, North General, Mt. Sinai, Beth Israel, NYU and Brooklyn.

Respondent’s unit employees are under the direction and control of the New York City Fire Department (FDNY), which operates the city’s 911 system. The FDNY is responsible for dispatching the 911 ambulance and tracking the location of the ambulances. In this regard, Respondent’s employees are obligated to keep the FDNY informed of their status and location. The FDNY can inspect the ambulance, can remove an EMT, paramedic or a vehicle from service and may issue notices of infractions (NOI) against EMTs or paramedics.

TransCare's employees are based at the various hospitals, where they report at the start and end of every shift. After they clock-in, the employees are dispatched by the FDNY to answer a 911 call. The employees are required to advise the FDNY of their status and any changes to that status on a regular basis. Such notification is generally accomplished by means of a mobile data terminal (MDT) in each ambulance. Each ambulance also contains a GPS device that provides the FDNY with the exact location of the ambulance.

Each ambulance within the 911 system is assigned a cross-street location (CSL). This is a location within the geographic area covered by a particular hospital, where the crew³ is supposed to be located when not on a call or while not delivering a patient to the hospital. The CSLs are determined by the FDNY, and a crew stationed at their CSL must provide the FDNY with a signal designated as noted as "10-89." A crew is considered to be at their CSL if they are located within a three-block radius of the specific CSL. When a CSL is located within three blocks of the hospital, FDNY prefers that the ambulance not to stay at the hospital itself, but to stay at a street away from the hospital.

If a crew is not at their CSL, there are a number of signals that they are required to use to keep FDNY dispatchers up to date on their status and location. If an ambulance is at a hospital delivering a patient, the crew will notify FDNY that are in "10-81" status, which means that they are unavailable to take another call.

When the crew finishes dropping off the patient at the hospital, it will clean the ambulance and get it ready for another call. When it has done so, it uses signals "10-97" or "10-98" to signify that it has left the hospital and is ready for another call.⁴ These signals are used until the crew is given another call or until it reaches its CSL, when as noted above, it changes the signal to 10-89.

In order for a unit to be signal compliant, it must actually be in the status for which it has signaled the FDNY. Signal compliance is monitored by both the FDNY and TransCare supervisors. While FDNY can monitor signal compliance by utilizing the GPS system, TransCare supervisors can do so by looking at the MDT in the ambulance or calling or asking the crew about its status.

TransCare's 911 operation is overseen by Shannon Greaves, who has been its Director of the EMS Division since June 2009. Prior to that date, she was the Operations Manager for the unit employees for four years. MaryAnn Sawyer was Respondent's Assistant Manager reporting to Greaves. When Greaves was promoted to Director, Sawyer was promoted to Operations Manager. From January 2009 through January 2010, Greaves was training Sawyer to become Operations Manager, so they would drive together during this period of time.

The next level of supervision for the EMS employees are site supervisors. These supervisors are stationed at particular hospitals and are each assigned a company vehicle, which they use to travel to accident sites, monitor employees at their CSLs and at times, to cover operations of filling in at other hospitals. They also are required to maintain spare ambulances parked at their hospitals in case they are needed.

³ An ambulance crew consists of two employees, which can be two EMTs or an EMT and a paramedic.

⁴ The difference between 10-97 and 10-98 involves how far away the crew is from its assigned area.

In addition to site supervisors, TransCare employs citywide supervisors on the 3:00 p.m. to 11:00 p.m. shift, an overnight shift and weekend shifts. These shifts are also supplied with company vehicles and are responsible for covering TransCare's 911 operations in New York City. In some cases, such as on the 3:00 p.m. to 11:00 p.m. shift, the citywide supervisor's hours will overlap those of some of the site supervisors.⁵ The overnight supervisors and weekend supervisors are generally the only TransCare supervisors on duty in the city for their shift or tour.

Until early 2009, TransCare did not have a regular weekend supervisor. The site supervisors were required to cover weekend shifts on a rotating basis. When needed, Greaves herself would fill-in for absent supervisors.

In January 2009, prior to the start of the union campaign, TransCare employed seven site supervisors. They were: Beth Perlowitz at Brooklyn Hospital; Michelle Cohen, who covered both Beth Israel and NYU; Sulton Hall, who covered Mt. Sinai and North General; Nancy Wallwork at St. Barnabas; Javier Duque was assigned to Montefiore; Jacqueline Felz was assigned to Bronx-Lebanon; and Jackie Feliciano was assigned to Montefiore North (formerly known as Our Lady of Mercy). Additionally, Ryan McMahon was assigned as the 3:00 p.m. to 11:00 p.m. supervisor, and Tom Whelan was the overnight supervisor.

In January 2009, TransCare decided, because of issues with compelling site supervisors to work on weekends, to create a position of weekend supervisor. The position was posted, and TransCare received 15 applications from its EMS employees. Greaves selected three finalists for the position: Carrie Boyd, Juan Debushea and Claudia Escoto, all of whom were trained as supervisors. Boyd was selected to fill the weekend supervisor's position and served in that capacity for a couple of months. At that time, Greaves removed Sulton Hall from his responsibilities as site supervisor at North General and transferred McMahon to that position. That left the 3:00 p.m. to 11:00 p.m. shift open, and Boyd moved to that position. Boyd's prior position of weekend supervisor was filled by Debushea. In May 2009, Hall was terminated. His position as site supervisor at Mt. Sinai was filled by Escoto.

TransCare's 911 Division operates twenty-four hours a day, seven days a week. Employees within the division generally work three or four twelve-hour shifts per week. The shifts are staggered and vary from hospital to hospital. The start times range from 6:00 a.m. to 9:00 a.m. and 6:00 p.m. to 9:00 p.m. Thus, shift changes were generally between those hours in the mornings and in the evenings. All employees begin and end their shifts during these shift change hours. On occasion, if an employee receives a call shortly before the end of a shift, that employee may work beyond his shift hours, which can require overtime pay.

IV. The Alleged Creation of the Impression of Surveillance

The Union's campaign began in April 2009. The Union held a series of meetings with employees of Respondent at various diners and restaurants between April and June.

Randy Dominguez was employed by Respondent as an EMT for approximately two years. He worked out of Bronx-Lebanon Hospital on four evening shifts starting at 5:00 p.m. or

⁵ The site supervisors work Monday through Friday on shifts at different times ranging from 5:00 a.m. to 2:00 p.m., 6:00 a.m. to 3:00 p.m., 8:00 a.m. to 5:00 p.m., 7:00 a.m. to 4:00 p.m., and 12:00 p.m. to 9:00 p.m. However, some site supervisors would at times work past the end of their shifts.

7:00 p.m. Dominguez became involved early as an open supporter of the Union. He attended union meetings, gave out cards, organized at different facilities on his own time and his name appeared in a leaflet prepared by the Union and distributed to Respondent's employees as a union supporter.⁶

Sometime in late April or early May, the Union held a meeting at a diner on Bedford Park Boulevard near Jerome Avenue in the Bronx. This meeting was not announced by the Union in any flyers or documents. Rather, word was spread of the meeting by union supporters, such as Dominguez. Matt Levy, the Union's Director of Organizing, conducted the meeting, which was attended by 10 employees, including Dominguez. The next day, Dominguez was approached by his supervisor, Jackie Felz outside the emergency room at the front of Lebanon Hospital. Felz began the conversation by asking Dominguez how he felt about the Union. Dominguez replied that he thought it was a good idea. Felz then informed Dominguez that she knew that there had been a union meeting at the diner and even mentioned the location. Felz also told Dominguez that she knew the names of some of the employees who attended, and actually mentioned the names of some of these employees, who were there.⁷ Dominguez made no reply to Felz and did not confirm or deny Felz's assertions as to which employees were present. According to Dominguez, he "was kind of stunned" by Felz's statement to him.

My findings with respect to this conversation between Dominguez and Felz are based on the credited testimony of Dominguez. Felz admitted to having a conversation about a union meeting with Dominguez, but asserts that Dominguez approached her about it, asked her if she had heard about the union meeting and then informed her of the names of three other employees, who had attended, including Hopelman, who was working with Dominguez on that day.

As noted, I credit Dominguez's version of this discussion. I find it highly unlikely that Dominguez would voluntarily disclose to his supervisors the names of employees, who attended a union meeting. I find Dominguez's testimony that he was "stunned" when Felz informed him of some of the attendees at the meeting to be believable. Respondent argues that since Dominguez was an open union supporter, it makes it likely that he would have told Felz about who attended the meetings. I do not agree. While Dominguez did not hide his own union activity, I do not find it probable that he would voluntarily disclose to his supervisor, the names of employees who attended a union meeting.

Further, I note that Dominguez is still employed by Respondent. Thus, his testimony, where it is adverse to his employer is considered to be against his self-interest and more worthy of belief. *Evergreen America*, 348 NLRB 178, 207 fn.63 (2006); *Stanford Realty Assoc.*, 306 NLRB 1061, 1064 (1992); *Molded Acoustical Products*, 280 NLRB 1394, 1398 (1986); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962).

V. The Alleged Surveillance of Union Meetings

On June 3, the Union held another informational meeting. This time at the VIP Café located at 131 East Gun Hill Road, next to Montefiore Hospital. The Union conducted a series of 6 meetings at that location, including on June 3 and on dates ranging between May 28 and June 18 from 5:00 p.m. to 9:00 p.m. These meetings were publicized by the Union's distribution of a

⁶ The document also listed 20 other employees as union supporters.

⁷ One of the employees, who Felz named as having attended the meetings, was Belker Hopelman.

flyer to employees of Respondent, which announced these meetings giving the location and dates and urging employees to attend.

Matthew Flood was first employed by TransCare in 1999 in its Transport Division, where he worked until 2001. He then became employed at Mary Immaculate Hospital from 2001 to February 2009, when it closed. He then reapplied for a position with TransCare and was hired in March 2009 in its 911 Division. Initially, he worked shifts at 3 hospitals. He worked on Mondays on the 8:00 a.m. to 8:00 p.m. shift at Mt. Sinai; on Wednesday from 9:00 p.m. to 9:00 a.m. on Thursday at NYU; and on Saturday 8:00 p.m. to 8:00 a.m. at North General Hospital. At some point after the Union's campaign began, at his request, his Wednesday evening shift at NYU was switched to day shift Wednesday from 9:00 a.m. to 9:00 p.m.

Subsequent to that, his schedule was again changed, also at his request to Friday, Saturday and Sunday shifts at Mt. Sinai. Finally, at another point, Flood requested and was granted a change to per diem status, which status continued through the instant trial.

Shortly, after his rehire by Respondent in March, Flood was contacted by Levy about becoming a per diem organizer for the Union.⁸ Flood agreed and was hired by the Union in that capacity. Flood received training and began organizing for the Union. Initially, Flood organized at other private ambulance companies only since he was on probation for 90 days at Respondent. When his probationary period expired, he began working on the TransCare campaign on behalf of the Union.

Flood attended the June 3 meeting at the VIP Café. He arrived at about 7:15 p.m. He parked his car on Gun Hill Road on the same side of the street as the café. While still in his car and on the phone, Flood observed a TransCare vehicle driven by Sawyer with Greaves in the front seat, drive by the café, down Gun Hill Road, a block or two, make a u-turn and drive back down Gun Hill Road past Flood in his car and past the VIP Café.

Flood got out of the car and entered the café. Present were two union officials, Steve Weigand and Tim Duffy. When Flood entered the café, Weigand informed him that no employees had shown up for the meeting. Flood sat down at a table in the café, where he could look out the window and observe Gun Hill Road traffic. During the next hour to an hour and a half, Flood observed the same TransCare car four more times, driven by Sawyer with Greaves in the front seat, drive by the café and three to five minutes later, again drive by the café. In these four occasions, Flood did not see the vehicle make a u-turn but assumed that it did since it passed by the café three to five minutes later. During this period of time, Flood was the only employee present in the café along with the two union officials.

On June 17, as noted, another meeting was held at the VIP Café. Levy attended this meeting and arrived shortly before the 5:00 p.m. start of the meeting. Between 5:00 p.m. and 6:00 p.m., three bargaining unit employees arrived for the meeting, one female employee and two male paramedics. While all three employees were present at the café, Levy observed a TransCare vehicle driven by Sawyer with Greaves in the front seat, drive past the café three times, back and forth for a total of six times, driving past the café during a period of from 30-45 minutes.

The above findings are based on the mutually corroborative and credible testimony of

⁸ Flood had previous contact with Levy at Mary Immaculate Hospital, where Flood had previously worked.

Flood and Levy. Greaves testified that she was aware of the union meetings at the VIP Café since she had seen the Union's notices. However, Greaves denied that she made multiple passes on June 3 or June 17 or 18, up and down Gun Hill Road. Greaves does admit to driving up Gun Hill Road on June 3 and passing the VIP Café because she was driving to Montefiore Hospital to relieve supervisor Claudia Escoto, who had been covering for Javier Duque, the regular assigned site supervisor at Montefiore. She further asserted that she also drove by the café to check on spare ambulances, so she had to drive again past the café to get back to the hospital emergency bay.

As noted above, I credit Levy and Flood and reject Greaves' denials of multiple passes of the café. In addition, to the fact that the testimony of Flood and Levy is mutually corroborative, I also rely on the absence of any testimony from Sawyer, who was the driver of Respondent's vehicle on both occasions. It is well settled that where a witness may reasonably be assumed to be favorably disposed to a party, the failure to call that witness to corroborate testimony of other witnesses of that party, an adverse inference is appropriate that had the missing witness been called the witness's testimony would have been adverse to that party. *Evergreen America*, supra, 348 NLRB at 239 (adverse inference drawn based on failure of respondent to call supervisor to corroborate respondent's president's testimony concerning reasons for giving wage increases); *Hialeah Hospital*, 343 NLRB 391, 393 fn. 20 (2004) (failure to call supervisor to corroborate president's testimony concerning alleged reasons for videotaping employee); *Made 4 Film Inc.*, 337 NLRB 1152, 1159 (2002) (failure to call secretary of employer's president to corroborate his testimony as to circumstances of signing a collective bargaining agreement); *DMI of Delaware*, 334 NLRB 409, 412 (2001) (failure to call supervisor, who failed to corroborate testimony of company vice-president that discriminatee has committed misconduct although supervisor was an employee when he allegedly made report to vice-president about discriminatee); *Gerig's Dump Trucking*, 320 NLRB 1017, 1024 (1996) (failure to call co-owner of employer to corroborate testimony of co-owner about decision to provide insurance benefits); *Basin Frozen Foods*, 307 NLRB 1406, 1417 fn. 41 (1992) (failure to call two supervisors to corroborate employer's president concerning discharge of discriminatee); *Overnite Transportation*, 329 NLRB 990, 1014 fn. 21 (1999) (failure to call representative of parent corporation).

Here, as related above, Sawyer was the driver of Respondent's vehicle, where Greaves was the passenger when it made multiple passes up and down Gun Hill Road past the VIP Café, where the Union meetings were taking place. The failure to call Sawyer to corroborate Greaves' denials leads to an adverse inference that I draw that Sawyer's testimony would not have corroborated Greaves on this issue. See cases cited above.⁹

VI. The Alleged Surveillance at Hospitals

Sultan Hall was employed by TransCare for eight and a half years. He began as an EMT, was moved up to paramedic and was promoted to site supervisor in September 2008. He was initially assigned to supervise employees at Mt. Sinai and North General Hospitals.¹⁰ His hours were 12 noon to 9:00 p.m. Monday to Friday.

⁹ See also *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (failure to call production manager, who was present during a conversation between employee and another supervisor); *Champion Rivet*, 314 NLRB 1097, 1098 fn. 8 (1994) (failure to call representative of predecessor employer to corroborate testimony of former supervisor of predecessor and supervisor of respondent employer as to reasons for failure to hire discriminatees).

¹⁰ He supervised 20 employees at Mt. Sinai and 10-12 at North General.

In early May, he was removed as site supervisor for North General. About a week later, on May 15, Hall was terminated by Respondent. The Union filed a charge on his behalf alleging that his termination was unlawful. The charge was subsequently withdrawn.

He was also employed by St. Luke's Hospital as a paramedic, starting in December 2008. At St. Luke's, Hall was a member of Local 1199 SEIU, the parent labor organization of Petitioner.

In April, while Hall was still supervising Respondent's employees at both hospitals, a meeting was held of supervisors conducted by Greaves. She informed the supervisors that a union was organizing Respondent's employees and instructed the supervisors to observe the employees when they speak to any union representative and to keep a lookout for the union representatives.

Greaves also asked the supervisors to help out on weekends and in the evenings by increasing their hours to increase the presence of supervisors at those times in order to try to sway employees to become "against" the Union.

Greaves also directed the supervisors to increase their "rounds" at CSLs "to see if any of the units were getting together and talking to the Union and see if any of the union representatives might have stopped by to speak to them."

Finally, Greaves distributed to all the supervisors present a spreadsheet containing the names of all of Respondent's employees broken down by the hospitals, where they worked. The sheet also contained 4 boxes designated as big "C," which meant that the employee was strong for the company, little "c," which meant that the employee could be swayed towards the company, big "U", strong for the Union, and small "u," which meant that the employee could be swayed toward the Union. Greaves and Sawyer instructed the supervisors to fill out these sheets and to mark the appropriate boxes for the employees under their supervision. The supervisors were told to fill out the sheets based on their conversations with employees about the Union and based on the supervisors' observations of whether and for how long the supervisors observed employees talking with union representatives.

In late April or early May, another supervisors' meeting was held. In addition to Greaves and Sawyer, present were Jeff Ellis, Vice-President of Human Resources and a consultant, who advised the attendees how "to stop the Union from coming in." The consultant instructed the supervisors to regularly speak to the employees about their feelings regarding the Union and try to sway personnel, who were for the Union, to be against it. They were instructed not to ask the employees about their feelings for the Union, but if the employees brought up the subject, the supervisors could express their opinions about the subject.

On May 14 at about 5:00 p.m. at Mt. Sinai, Hall was in the crew room doing paperwork when one of the employees came in and told Hall that union representatives were outside speaking to employees and handing out union pamphlets. The employee gave Hall a union brochure that she had received from the union representative. As instructed, Hall phoned Greaves and told her that Union delegates were outside. Greaves told Hall to go outside and observe which employees were speaking to the union representatives and to have the units respond to their CSLs as fast as possible.

Hall, as instructed, walked outside and stood across the street from the hospital about 40 feet away from where the emergency room entrance, where two union representatives were

standing.¹¹ Hall stayed there for the entire shift change, which last until shortly after 8:00 p.m. At the 6:00 p.m. shift change, Hall observed one employee speaking to the union representatives for 15 minutes. At the 7:00 p.m. shift change, Hall observed employee Louis Parrow speaking to the Union and receiving union literature as he was having a soda while waiting for his
 5 ambulance. Parrow then walked across the street, gave Hall the literature that he had received from the Union representative and said to Hall that the “Union is trying to get me to vote for the Union.” Hall replied that Parrow had to make an informed decision on his own and that he (Hall) can’t tell him to vote for or against the Union.

10 At about 7:15 p.m., two employees, Guzman and Pylo, after signing out, stopped to speak to the union representatives for 20 minutes to a half-hour. Hall observed the discussion and saw both of these employees accept literature from the Union. They waived to Hall as they were leaving.

15 At the 8:00 p.m. shift change, employee Julius Zomper arrived early, spoke to the union representatives on his own time and accepted literature. A second employee arrived, spoke to the union representative for 5 minutes but did not take any literature. Two employees leaving from the 8:00 p.m. shift after they signed out, spoke to the union representatives for 15 minutes. One of the two employees accepted literature. The union representatives left at 8:15 p.m.
 20 During this shift change period (6:00 p.m. to 8:00 p.m.) while Hall remained outside and observed employees speaking to the Union and accepting literature, Hall made no attempt to interfere with the discussion and did not at any time approach the Union and the employees while they were talking.

25 Hall went into the crew room to check paperwork. At 8:20 p.m., Greaves and Sawyer came to Mt. Sinai and spoke to Hall. Greaves asked what he had observed. He responded by informing Greaves and Sawyer which employees he had seen talking to the Union and which employees had accepted literature. He also told them which employees had given Hall literature that they had received from the union representatives. Greaves told Hall that he would have to redo his spreadsheet based upon what he saw. In fact, Hall did not get a chance to do so since
 30 he was terminated the next day, May 15. In fact, Hall had previously filled out the spreadsheets based on his conversations with employees.

35 Hall testified that he ordinarily spent some of his time inside the crew room and some outside observing employees. He had been instructed by higher level supervisors to monitor employees by observing them. However, he never, prior to May 14, had observed the employees for the entire shift change or for a period of two hours continuously.

40 Hall also did increase his time spent at CSLs to see if the union representatives were there, but he didn’t see any union representatives present at any CSL.

45 The above findings are based on the credible testimony of Hall, which was not denied or contradicted by Greaves, Sawyer or any witness of Respondent. Respondent asserts that Hall’s testimony should not be believed because he was a union member at St. Luke’s, because he testified at the representation hearing as a witness for the Union and because he helped the Union to organize after he was terminated by Respondent. I disagree.

50 I found Hall to be believable and candid and attempting to recount events as he recalled them, whether or not the testimony was helpful to the Union. For example, he testified that he

¹¹ Levy was one of the two union representatives present.

was told by Respondent's supervisors not to ask employee questions about how they felt about the Union. More importantly, as noted above, neither Greaves, Sawyer or any other witnesses of Respondent denied or contradicted Hall's version of events.

5 The Union campaign began in April. It continued through the election held in November. The petition, as noted, was filed on June 19. The campaign was run, as noted, by Levy with assistance from a number of other union officials, plus several TransCare employees and former TransCare employees.

10 Part of the campaign included organizing at the hospitals, where employees report to work and where they report at the end of their workday. The employees reported to their assigned hospitals primarily during shift changes in the mornings and in the evenings. During these shift changes, union organizers would attempt to speak to employees during these visits and to hand them union literature.

15 The evidence discloses that during a substantial number of these visits, both before and after the petition was filed as at most facilities, particularly Bronx-Lebanon, Beth Israel and Brooklyn Hospitals, a number of supervisors, who did not work at the site¹², would suddenly appear at the hospital. These supervisors invariably included Greaves and Sawyer. Other
20 supervisors, who would appear, included Boyd, Debushea, Duque, Wallwork, McMahon and Feliciano.

 Levy and/or the other union representatives would attempt to speak to employees as they were coming into the facility or when they were leaving. At times, the employees were on
25 the clock, and at times the employees had finished work or hadn't started work. The union representatives would speak to the employees and try to persuade them to accept union literature. Sometimes, they would speak to employees for five or ten minutes, sometimes for over a half-hour. This latter discussion generally would be with employees, who had finished work or had not started work.

30 During many of these discussions, a number of supervisors (including Greaves and Sawyer), who had arrived at the facility, would congregate along with the site supervisor and would stand from 10-40 feet away from the union representatives. The supervisors would generally observe the union officials talking to the employees and could see which employees
35 accepted union literature. The supervisors would remain at the hospital as long as the union representatives were there, at times for the entire shift change.¹³

 During several of these incidents, employees would comment to the union representatives that they felt intimidated and/or were afraid to talk to the Union while the
40 supervisors were watching. Some other employees also informed Levy that they were surprised to see so many supervisors at the same place.

 The above findings are based on a compilation of the credited portions of the testimony of Levy, Dominguez, Flood, Ortega and Claire Sandberg-Bernard.¹⁴

45 ¹² Ordinarily, as related above, a site supervisor would be present as well. On some occasions, particularly during the evening shift changes, there would not be a site supervisor present since that supervisor's work day had been completed.

¹³ The shift change most frequently involved was from 6:00 p.m. to 9:00 p.m.

50 ¹⁴ Sandberg was a union organizer. Dominguez and Flood were employees of TransCare, who assisted in organizing. Ortega was employed by TransCare and was terminated. He was a

Continued

The testimony of the Union's witnesses is mutually corroborative in most respects concerning these findings. Further, Greaves didn't substantially dispute any of the above findings. She admits that she, along with Sawyer, would receive calls from site supervisors when the Union was there, and she and Sawyer would go to the site and remain there for the entire shift change period observing the Union speaking to employees and handing the employees literature.

The only significant factual dispute between the witnesses for Respondent and those of General Counsel and the Union involve past practice of Greaves, Sawyer and other supervisors *vis a vis* their presence at hospital sites. I find based on the mutually corroborative and credible testimony of Dominguez, Ortega, Flood and Hall that prior to the start of the union organizing in April, Greaves, Sawyer and other supervisors from sites other than their assigned hospitals would rarely be seen at hospitals, particularly at Bronx-Lebanon, Brooklyn and Beth Israel Hospitals. Further, when they (Greaves, Sawyer or other site supervisors) would appear at these hospitals, they would not stay long and they would not remain at the hospital for an entire shift change.¹⁵

To the extent that the testimony of Greaves and supervisors Cohen, Felz and Boyd are inconsistent with these findings, such testimony is not credited. In that regard, Greaves' testimony that both before and after the union campaign, she would visit every hospital at least once a day and that she would frequently during these visits remain at a site for the entire shift change is not believable. Not only is that testimony inconsistent with the credited mutually corroborative testimony of Dominguez, Ortega, Flood and Hall,¹⁶ but Sawyer, as noted above, did not testify. As related above with respect to the other issues, the failure to call Sawyer, who accompanied Greaves on all of the visits to sites when the Union was there and who was with Greaves during Sawyer's training for several months prior to the appearance of the Union, is significant. It calls for an adverse inference, which I find it appropriate to draw, that if called Sawyer would not have given testimony favorable to Respondent on these issues. *Hialeah Hospital*, supra, 343 NLRB 393; *Made 4 Film*, supra, 337 NLRB at 1159; *Basin Foods*, supra, 307 NLRB 1417.¹⁷

Greaves further testified that she would be summoned to hospitals by calls from supervisors informing her that the Union was affecting service and that the supervisors needed her assistance. Greaves then conceded that once she went to a site, she would stay for the entire shift change or until the Union left to make sure that the Union did not "affect" service later in the shift. According to Greaves, the "employees react differently when they see me." During the time that she remained at the site, Greaves further admitted that she would observe union

union supporter before the discharge and became a union organizer after his discharge, wherein he assisted Levy in organizing TransCare.

¹⁵ As noted, shift changes ranged from two to three hours.

¹⁶ I note that Flood and Dominguez are still employed by Respondent. Thus, their testimony is more worthy of belief. *Evergreen America*, supra, 348 NLRB at 207; *Georgia Rug Mill*, supra, 131 NLRB at 1305.

¹⁷ To the extent that supervisors Cohen and Felz provided some support for Greaves' testimony, I do not credit same. Both supervisors were too quick to maintain what they viewed as Respondent's position that there was no difference in frequency in Greaves' visits to their sites before or after the union campaign began. Indeed, even Greaves conceded that such visits increased after the organizing started, but was necessitated by the fact that service was being interrupted by the Union.

officials speaking to employees as well as handing out literature to them. Greaves further admitted that during these shift changes, both she as well as other supervisors present would also distribute literature and/or speak to employees about the Union.

5 Testimony was also adduced concerning several specific incidents, which is alleged by General Counsel and/or the Union, to constitute additional evidence objectionable of unlawful surveillance by Respondent.

10 Sandberg-Bernard testified that on June 3 she was organizing for the Union at Beth Israel Hospital during the evening shift change. At about 8:30 p.m., Sandberg-Bernard noticed an ambulance idling a block away from the hospital. Two paramedics, Mike --- and Ali ---, were in the ambulance and were reading books. They were apparently waiting for their shift to end or to be notified of another call. Sandberg-Bernard approached the ambulance and began talking to the two employees about the Union. After a few minutes, Carrie Boyd came over to the
15 ambulance. According to Sandberg-Bernard, Boyd began to talk to Ali while she continued to speak with Mike. Sandberg-Bernard did not hear or recall what Boyd said to Ali. However, Sandberg-Bernard asserts that Boyd remained at the ambulance after her conversation with Ali and was "staring" at the employees and Sandberg-Bernard. After a minute or so of the staring, Sandberg-Bernard felt that the employees were uncomfortable talking with her with Boyd
20 present so she walked away. Sandberg-Bernard adds that subsequent to this event neither Mike nor Ali would speak with her while they had talked to her prior to that incident.

 Boyd recalled the incident, which occurred while she was the evening supervisor. Boyd asserts that on the day in question she had been asked by Mike and Ali to fix their radio mike.
25 She did so, and then told them to get to their CSL because the fire department does not want the ambulance to be parked where they were located. About 10 minutes later, Boyd noticed that the ambulance was still there and the employees had not complied with her instructions to go to their CSL. Boyd contends that she then went back to the ambulance and when she approached it, she noticed Sandberg-Bernard talking to the employees from the other side of the vehicle.
30 Boyd told the employees that she had previously told them to go to their CSL and repeated these instructions again. One of the employees, according to Boyd, replied "Oh, we were speaking to her," referring to Sandberg-Bernard. Boyd claims that she replied that's not a problem but the employees could speak to her at their CSL, adding "You can speak to her all you want, but you need to go to where the fire department requested that we go." The crew then
35 left to go to their CSL as Boyd had instructed.

 Sandberg-Bernard testified about an incident that occurred sometime in early June, but she did not specify which hospital was involved. According to Sandberg-Bernard, she observed an ambulance parked with an employee cleaning and restocking the vehicle. Sandberg-Bernard
40 began speaking to the employee about the Union. After a few minutes, Greaves approached the vehicle, and according to Sandberg-Bernard, Greaves stood directly next to her and gave some work related instruction to the employee, but she did not recall specifically what Greaves said to the employee. Sandberg-Bernard further asserts that she then walked away because she didn't want to put the employee in a position of having to choose between listening to someone from
45 the Union and a supervisor.

 Greaves did not furnish any specific testimony concerning this alleged incident but stated her general procedure with respect to union representatives speaking to employees when she was present. Her practice was after a minute or two of observing employees talking
50 to union representatives to approach the vehicle and find out if the employees were signal compliant. If not, she would instruct them to do so, including to go to their CSL if that was appropriate.

On June 4, at Beth Israel Hospital, in the morning, Sandberg-Bernard was speaking to employee John Henderson, who was known to be strongly anti-union. While they were talking, Greaves and Sawyer arrived. Henderson went over to them and asked Greaves and Sawyer, "What are you guys doing here?" Greaves replied, "Oh, we're here to bust the Union." Greaves, Sawyer and Henderson were laughing about Greaves' comment for several minutes. Sandberg-Bernard texted Levy and informed him that "they were joking about busting the Union."

Greaves did not deny making the comment to an employee about "busting the Union."

Sandberg-Bernard also furnished testimony on direct examination that "unspecified" supervisors would "physically stand next to me as I would start talking to someone, who was, you know, about to leave or on their way out, or even insert themselves physically between myself and an employee." She was then asked how many times did that happen. Her response was that she remembered only one time, that being the incident described above when Greaves stood next to Sandberg-Bernard while Sandberg-Bernard was talking to an employee and gave instructions to the employee.

Sandberg-Bernard testified further on direct that Boyd "would physically insert herself between myself and an employee on numerous occasions." When asked how many times that happened, Sandberg-Bernard answered three or four times, and added that Boyd was "very aggressive in preventing me from having access to the employees."

When pressed on cross-examination to describe the three or four incidents, where Boyd allegedly got between her and an employee, Sandberg-Bernard backtracked and stated she saw Boyd on three or four occasions, but that on one occasion Boyd was "particularly aggressive in talking to any employees, who I happened to try to talk to." She admitted that this one time was the June 3 incident involving employees, Mike and Ali, described above.

Levy testified that at Beth Israel Hospital, Michelle Cohen, the site supervisor, would immediately jump out of her vehicle when Levy began talking to employees and "would come with shoulder, and like put it in front of me, and insert herself in front of me in the middle of a conversation."

Levy further testified to a specific incident in later August or early September when he was speaking to employees, Barbara Williams and Dawn ---, about the Union and health benefits. The employees were in the process of checking out the ambulance to make sure it was fully equipped and ready for use.

After a minute or two, Cohen approached the ambulance, Cohen inserted herself between Levy and the employees and asked the employees, "How's your morning going?" and then continued "small talk" with the employees about the weekend and how their unit is. That type of conversation continued between Cohen and the employees for three minutes at which time Cohen got into the ambulance and sat in the front seat. Cohen then continued the "small talk" with employees for another two minutes. At that point, Levy said, "It looks like we're done here" and he left. During this incident, Levy offered to buy coffee for the employees as well as for Cohen. The employees said "No, thank you." Cohen replied "No" but made no other comments to Levy.

Cohen recalled the incident but asserted that she was assisting Williams and Dawn in changing vehicles and that she got into the vehicle because it was raining. Cohen did not testify precisely how she was "assisting" the employees in switching vehicles and did not deny Levy's

testimony that she engaged in five minutes of “small talk” with employees in Levy’s presence. Cohen confirmed Levy’s testimony that he had offered to buy coffee for the employees and Cohen and that all three of them declined Levy’s offer.

5 Levy testified concerning another incident involving Cohen at Beth Israel.¹⁸ Levy asserts that he was speaking to two employees, Maddis Gazzard and her partner, fifteen minutes before their shift ended. Cohen approached the ambulance, got between Levy and the employees and instructed the employees to go to their CSL. Gazzard responded that the employees were off in fifteen minutes. Cohen replied “I don’t care. You have to go to your 89.”
10 (89 is synonymous with the CSL.) The employees left, went to their CSL and in fact received a call for another job on the way.

Cohen essentially confirmed Levy’s version of the incident and testified that the fire department policy requires the employees to leave the hospital when they are ready and go to the CSL regardless of how much time is left on their shifts.
15

Levy also furnished testimony that at the end of July he went by subway to Mt. Sinai Hospital. When he arrived, he saw Claudia Escoto, the site supervisor, in a TransCare vehicle. They said hello to each other. Levy began to talk to employees. Shortly, thereafter, several
20 supervisors from other sites arrived at the hospital, plus Greaves and Sawyer, and stood with Escoto 15 feet away from Levy and the employees. Some employees told Levy that they didn’t feel comfortable talking with the Union in front of supervisors. Later on, Levy spoke to some outspoken union supporters that day while the supervisors were watching as the employees were coming off duty. The supervisors made no effort to interfere with Levy speaking to employees. Escoto did not testify. Thus, Levy’s testimony with regard to this incident is
25 undenied.

On June 1, Greaves received a phone call from an employee named Letticia Rivera. Rivera informed Greaves that she was at Jacobi Hospital,¹⁹ and complained to Greaves that
30 she was “sick and tired” of telling the Union that she was not interested, but the union representatives continue to “berate her about the Union.” Greaves told Rivera that she was on her way to Jacobi Hospital.

By the time Greaves, accompanied by Sawyer, arrived at Jacobi, Rivera’s unit had received a call and was leaving the hospital. Greaves noticed however that another TransCare ambulance from Montefiore Hospital was parked in the ER bay. No one was in the ambulance. Greaves made a call and found out that the unit had been at the hospital for 28 minutes. Greaves then observed Ortega and Levy speaking to employees from different employers, who were also at the hospital at the time.
40

A few minutes later, the two TransCare employees came out of the hospital. While the employees were in the ambulance, one of them was working on paperwork and the other was making up the back of the truck. Ortega and Levy approached the ambulance and began speaking to the employees. After about five minutes, the employees were outside the
45 ambulance talking to Ortega and Levy. Greaves come over to the ambulance. She informed the employees that they had been there too long and that they had to go to their CSL. Greaves also addressed Levy and Ortega. She said to them “You’ve got to be kidding me. You’re affecting my

¹⁸ Levy did not testify as to the date of this incident.

50 ¹⁹ While Jacobi Hospital is not under contract with Respondent, it is a level one training hospital, so at times, TransCare ambulances will bring patients to that emergency room.

service. You can't continue to do this." Levy laughed and replied that "We're not affecting your service!" Ortega chimed in "Come on. Shannon, really. Are we really affecting the service?" Greaves replied that the employees were talking to the union representatives and they needed to go into service. The employees then entered the ambulance and left the hospital as instructed.

The above findings concerning this incident are based on a compilation of the credited portions of the testimony of Greaves, Ortega and Levy. There is substantial agreement between the witnesses as to the event, except that Levy placed it as occurring in August or September. However, Ortega, the Union's witness, corroborated Greaves that the incident occurred on or about June, right before Ortega was terminated. To the extent that there is some dispute about precisely what the employees were doing when Greaves ordered them to go to the CSL, I credit Greaves' version of the incident, which I found to be more detailed and believable.

Sometime in September, Ortega and Levy were once again at Jacobi Hospital in the hopes that employees of TransCare would show up. There were no employees of Respondent present on that day. However, Greaves and Vice-President Doug Key drove up in their personal vehicles and both got out of their cars. Levy made a gesture like he was looking under his car. Levy then said to Key and Greaves, "What do you have, some kind of tracking device on our car and you go wherever we go?" Neither Key nor Greaves responded. Levy and Ortega then left the hospital.

The above findings are based on the undenied testimony of Ortega and Levy. Key did not testify and Greaves furnished no testimony concerning this incident. Thus, the record contains no explanation of how and why Greaves and Key appeared at Jacobi Hospital on the day that Levy and Ortega were there in September.

VII. The Bulletin Boards

At some point, undisclosed by the record, Respondent installed locked bulletin boards in its crew rooms at the various hospitals. Some of the crew rooms also had unlocked bulletin boards. Respondent's supervisors had the key to open and lock the locked bulletin boards. Employees did not have access to the locked bulletin boards. Respondent allowed only notices posted by TransCare to be placed on the locked bulletin boards. Employees were permitted to post items on the unlocked bulletin boards or on the walls of the crew rooms. Flood, on behalf of the Union, posted union literature on the walls of the crew rooms as well as on unlocked bulletin boards. Some of these items were removed, but Flood did not know who removed them.

Neither Flood nor any union official or representative ever made any request to post items in the locked bulletin boards. TransCare did post anti-union literature in its locked bulletin boards.²⁰

Flood admitted that he had removed anti-union literature that he had seen on the walls and/or the unlocked bulletin boards at various hospital crew rooms.

Sometime in October, Greaves had a conversation with Flood at Beth Israel Hospital. She said to Flood, "Rumor is that you're going into the rooms, removing TransCare posted memos. You know it's against policy to deface or destroy TransCare's property. Please, if you are doing this, you need to stop."

²⁰ These were usually the same literature that it had previously distributed to its employees.

My findings with respect to this conversation are based on Greaves' credited testimony. Flood testified that Greaves informed him that "You never know who is watching you" and that "You don't want to be caught posting things on that wall." Flood later changed that testimony twice. While repeating the alleged statement by Greaves, Flood testified that she told him, "If you don't know if you are being watched, don't post it anywhere." On cross-examination, Flood asserted that Greaves discussed not posting and don't take things down with him during that conversation. Flood gave another somewhat different version of Greaves' alleged comments to him. "As discussed in previous testimony yesterday and today was that Shannon said do not putting thing or taking things down. You never know when I'll be, if I'm watching."

Further, Flood furnished three affidavits to the Board, including one dated September 10 that dealt with the bulletin board issue. In none of these affidavits did Flood mention that Greaves had told him not to post anything or that he was being watched.

Since Greaves credibly denied that she made either of these comments, my findings above reflect that Greaves told him only not to remove postings of TransCare documents.

Sometime in October, Flood noticed a document in the locked cabinet at Mt. Sinai, which Flood characterized as an announcement of an anti-union meeting. The document, which is not on TransCare stationary or letterhead is entitled, "TransCare EMT's Personnel Meeting." The document reads: "Please join your co-workers in a discussion about the proposed union." The document indicated the place, the date (October 25) and time of the meeting and states if there are any questions, contact Joe Pena²¹ and contains his phone number.

Flood did not testify how often he saw this document posted on the locked bulletin boards. Greaves saw a copy of this document taped on walls at hospitals as well as at other places. She did not see it posted at any locked bulletin boards. However, she did receive a phone call from someone telling her that this memo was posted in the locked bulletin board at Mt. Sinai Hospital. Greaves immediately called the site supervisor at Mt. Sinai and instructed the supervisor to remove the document from the locked bulletin boards since it was not a TransCare approved document.

VIII. Conduct at Brooklyn Hospital during Election

The election was a mixed manual and mail ballot election. The manual portion of the election was conducted on Nov. 17 and 18 at six hospitals located in Manhattan, Bronx and Brooklyn, where TransCare employees are stationed.

At Brooklyn Hospital, the balloting was conducted in the crew room located inside the hospital, located off a hallway more than forty feet from the entrance to the emergency room.

On November 17, Ed Ortega received a phone call from an unnamed individual informing him that site supervisor Beth Perlowitz and Human Resource Director Dawn Rose were parked in a TransCare vehicle in the parking lot outside the entrance to the emergency room, where employees enter the hospital in order to vote. The individual told Ortega that Perlowitz and Rose were not supposed to be there.

Ortega then drove to the hospital and observed Perlowitz and Rose sitting in a

²¹ According to Flood, Pena is a "known" anti-union employee.

TransCare vehicle in the ER bay. According to Ortega, employees would have to pass by this car in order to enter the hospital in order to vote. Ortega approached the vehicle and asked them to move, telling Rose and Perlowitz that they were not suppose to be there. Rose responded no that they would not move because “they”²² told the company representatives that they could sit there. Ortega remained at the site for “a few minutes” but during this period of time, he did not see any employees entering the hospital or passing by the company vehicle. He did see some employees, who were on duty, working on their vehicles. When Ortega left the site, Rose and Perlowitz were still in the company vehicle in the ER bay.

Later on during the morning of the first day of the election, Ortega returned to Brooklyn Hospital. At that time, Rose and Perlowitz had moved the TransCare vehicle to the street in front of the ER. They were still sitting in the vehicle. According to Ortega, from this vantage point, the occupants of the vehicle could see anyone coming into the ER entrance in order to vote. However, Ortega concede that employees would not necessarily have to pass by the TransCare vehicle in order to enter the facility since it depended on which direction the employees were coming from to determine if they would have had to pass by the vehicle in order to enter the polling facility. Once again, Ortega remained at the hospital for a few minutes and then left. Once again, he did not see any employee entering the facility during the period of time that he was there.

On the second day of the voting, November 18, Ortega went to Brooklyn Hospital at the end of the closing of the polls as well as in the morning. Once more, he observed Rose and Perlowitz in the street, where they had been on his second visit the day before. Once more, Ortega did not see any employees entering the hospital during his visits on November 18.

IX. Analysis Unfair Labor Practices

A. The Alleged Creation of the Impression of Surveillance by the Conduct of Felz

I have found above that in late April or early May that Felz informed employee Dominguez that she knew that there had been a union meeting at the diner, then mentioned the location of the diner and informed Dominguez that she knew the names of some of the employees, who had attended the meeting,²³ and mentioned the names of some of the employees, who were present at the meeting. Dominguez made no reply to Felz’s assertions since he was “kind of stunned” by Felz’s statements to him.

Having credited Dominguez’s testimony in this regard, the question is whether Felz’s comments establish that the Employer created the impression of surveillance of its employees’ union activities as asserted by the General Counsel. The test for determining whether an employer has created the impression that its employees’ union activities have been placed under surveillance is whether the employees would reasonably assume from the employer’s statements or conduct that their union activities had been placed under surveillance. *Stevens Creek Chrysler Dodge*, 353 NLRB 1294, 1295-1296 (2009); *Donaldson Bros.*, 341 NLRB 958, 961 (2004); *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998). The standard is an objective one

²² Rose did not testify who it was that allegedly informed her and Perlowitz that they could stay in that area.

²³ The meeting had occurred the night before the conversation between Felz and Dominguez. About 10 employees attended the meeting, including Dominguez.

based on the rationale that “employees should be free to participate in union organizing campaigns without fear that members of management are peering over their shoulders taking note of who is involved in union activities and in what particular ways.” *Flexsteel Industries*, 311 NLRB 257 (1993).

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The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. *Central Valley Meat Co.*, 346 NLRB 1078, 1080 (2006); *Spartech Corp.*, 344 NLRB 576, 577 (2005); *North Hills Office Service*, 344 NLRB 1083, 1095 (2005). The Board also does not require that as employer’s words on their face reveal that the employer acquired its knowledge of the employees’ activities by unlawful means. *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 254 fn. 6 (2006); *Sam’s Club*, 342 NLRB 620 (2004); *North Hills*, supra, 344 NLRB at 1095.

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When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employer violates Section 8(a)(1). This is because the employees are left to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring. *Stevens Creek Chrysler*, supra, 353 NLRB at 1296; *Conley Trucking*, 349 NLRB 308, 315 (2007); *Dallas & Mavis Carrier*, supra, 346 NLRB at 254; *United Charter Service*, 306 NLRB 150, 151 (1992). See also *Beverly California*, 326 NLRB 232, 233 (1998).

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In applying these principles to the instant facts, it is clear that Felz’s comments violated the standards detailed above and violated Section 8(a)(1) of the Act. Felz informed Dominguez that she was aware of the union meeting the night before, where it was held and which employees had attended. Felz did not inform Dominguez of the source of her information, so that Dominguez could reasonably conclude that the information was obtained through Respondent’s monitoring. *Stevens Creek Chrysler*, supra; *Conley Trucking*, supra.

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Additionally, the meeting was held outside the premises of Respondent, and this meeting was not a publicized open event. *Stevens Creek Chrysler*, supra at 1296. By informing Dominguez that she was aware of the location of the meeting as well as which employees attended, Felz demonstrated significant knowledge by Respondent of details of the meeting and adds to the reasonableness of Dominguez’s belief that Respondent was monitoring the employees’ union activities. *Conley Trucking*, supra at 315 (supervisor informed employee the day after a union meeting that the supervisor heard that employee, plus two other named employees, were trying to get a union in); *Spartech Corp.*, supra, 344 NLRB at 576-577 (statement by supervisor that he knew who attended a union meeting held a day or two prior); *United Charter Service*, supra, 306 NLRB at 151 (supervisor informed employee that he knew about union meetings and detailed the specific topics discussed at the meetings); *Emerson Electric Co.*, 287 NLRB 1065 (1988) (supervisor told employee that he was aware that employee had attended union meeting and had expressed an interest in the union).

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Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent violated Section 8(a)(1) of the Act by Felz’s comments to Dominguez.

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B. The Alleged Surveillance of Union Meetings

I have found above that on two occasions, on June 3 and on June 17, while the Union was conducting meetings at the VIP café and while the employees were present at the meetings, Respondent’s vehicle driven by Sawyer, with Greaves in the passenger seat, made multiple passes back and forth past the café, where the meetings were being held.

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Such conduct by Respondent constitutes flagrant violations of unlawful surveillance of employees' union activities. *Kosher Plaza Supermarket*, 313 NLRB 74, 86 (1993) (owner of employer and his son drove by employees' meeting with union twice); *Lakepark Industries*, 293 NLRB 452 fn. 2 (1989) (two supervisors drove back and forth past union meeting in school parking lot); *Mid Mountain Foods*, 291 NLRB 693, 697, 699 (1988) (automobile driven by supervisor drove by union meetings in motel three times); *Action Auto Stores*, 298 NLRB 875, 887 (1990) (supervisor drove back and forth past house where union meeting was being held). See also *Control Building Services*, 337 NLRB 844, 845 (2002) (supervisors stared at employees attending union meeting for fifteen meetings at restaurant.)

I therefore find that Respondent further violated Section 8(a)(1) of the Act by such conduct.

C. The Alleged Surveillance at the Hospitals

It is well settled that an employer's mere observation of open public union activity does not constitute unlawful surveillance. *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007); *Roadway Package System*, 302 NLRB 961 (1991); *Southwire Co.*, 277 NLRB 377, 378 (1985). However, it is equally clear that where such observation is found to be "out of the ordinary," it is unlawful since it creates the impression that the employer is monitoring the union activities of its employees. *Sprain Brook Manor*, supra; *PartyLite Worldwide Inc.*, 344 NLRB 1342, 1343 (2005); *Loudon Steel Inc.*, 340 NLRB 307, 313 (2003).

In applying these principles to the instant facts, I first consider Respondent's conduct at Mt. Sinai Hospital on May 14. There, Site Supervisor Hall complied with the previous instructions he had received from higher management and immediately notified Greaves that the union delegates were outside the hospital speaking to employees. Greaves instructed Hall to go outside and observe which employees were speaking to the union representatives. Hall complied with these orders and watched employees speaking to union representatives and/or accept union literature from them for the entire shift change from 6:00 p.m. to 8:00 p.m. Significantly, this conduct was unusual for Hall since he, unlike other of Respondent's site supervisors, spent much of his time inside the crew room, and that prior to this incident, he had never observed employees for the entire shift change or for a period of two hours continuously. In these circumstances, I find that Respondent's conduct on May 14 was "out of the ordinary" and violative of Section 8(a)(1) of the Act. *PartyLite Worldwide*, supra (supervisors observed employee's receiving union literature for 15 minutes); *Carry Cos. of Illinois*, 311 NLRB 1058, 1072-1073 (1993) (employer representatives observed organizational for three hours and continued to watch until union representatives left); *Nashville Plastic Products*, 313 NLRB 462, 464, 466-467 (1993) (continuous scrutiny of union activities over a substantial period of time). In making this finding, I also rely on Greaves' instructions to Hall before the observation (to observe which employees were speaking to the Union) and after (instructing Hall to revise his spreadsheet of his opinion of union sympathies of employees based on his observations) as well as the fact that Hall reported to Greaves which employees he had seen talking to the Union and/or accepting literature.

I am cognizant of the fact that the Complaint does not allege that Respondent violated the Act by any conduct of Hall. However, this omission does not preclude my finding of a violation based on Hall's conduct. It is well settled that the Board may find unalleged violations if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Golden State Foods*, 340 NLRB 382 (2003); *Yellow Ambulance Services*, 342 NLRB 804, 824 (2004); *Gallup Inc.*, 334 NLRB 366, 367 (2001); *Yale New Haven Hospital*, 309 NLRB 363, 368-369 (1992); *Hi-Tech Cable*, 318 NLRB 280 (1995). Here, this test has been fully satisfied.

Indeed, the Complaint allegation involved alleges that Respondent “engaged in surveillance of employees to discover their union activities by increasing the supervision of its employees.” This allegation does not name specific supervisors as having engaged in such conduct, so Hall’s conduct would clearly be encompassed by this Complaint allegation. I further find that Hall’s conduct was fully litigated. Respondent vigorously cross-examined Hall concerning his testimony with regard to these incidents and argues in its brief that Hall’s testimony should not be believed. Therefore, I find that Hall’s conduct was fully litigated, and my finding of a violation is appropriate. *Yale New Haven*, supra (finding appropriate although complaint did not allege that supervisor made unlawful comment); *Yellow Ambulance*, supra (respondent addressed conduct in its brief); *Hi-Tech Cable*, supra (respondent cross-examined witness concerning conduct in question and addressed conduct in its brief).

General Counsel and Charging Party also contend that Respondent engaged in similarly “out of the ordinary” and unlawful surveillance by Greaves, Sawyer and other supervisors, who engaged in prolonged observation of employees talking to union representatives at various sites. I find that the evidence supports these contentions.

I have found above that both before and after the Petition was filed,²⁴ at many of the hospitals, particularly Bronx-Lebanon, Beth Israel and Brooklyn Hospitals, a number of supervisors, who did not regularly work at the sites, invariably including Greaves and Sawyer, would suddenly appear at the sites shortly after the union representatives appeared at the sites to speak to employees on their way in or out of the facility. The supervisors, including Greaves and Sawyer, would congregate along with the site supervisor²⁵ and stand from 10-40 feet away from where the union representatives were talking to employees. The supervisors observed the employees talking to the Union, and could and did, see which employees accepted union literature. The supervisors would remain at the particular hospital as long as the union representatives were there, at times for the entire shift of between two and three hours.

I have also found, as described above, that this prolonged presence of multiple supervisors at these sites was highly unusual. Thus, Greaves and Sawyer, and the non-site supervisors would rarely be seen at the hospitals other than their assigned sites and that neither Greaves, Sawyer nor the other supervisors would remain at the hospital for entire shift changes.

Accordingly, the conduct of Greaves, Sawyer and other supervisors, who did not regularly work at the sites involved, of observing employees for prolonged periods of time was “out of the ordinary” and is unlawful, absent adequate justification by Respondent for such conduct. *Smithfield Packing Co.*, 344 NLRB 1, 3 (2004). I find that Respondent’s conduct was “out of the ordinary” since it was unusual for Greaves and Sawyer and the non-site supervisors to be present at the sites for such a prolonged period of time. *Sprain Brook Manor*, supra, 351 NLRB at 1191 (supervisor involved did not usually work on Saturdays when observation took place); *Carry Cos. of Illinois*, supra, 311 NLRB at 1072, 1073 (supervisor observed employees talking to union for three hours until union representatives left facility); *Nashville Plastic*, supra at 464 (continuous scrutiny of employees by a number of supervisors over substantial amount of time); *PartyLite Worldwide*, supra, 344 NLRB at 1342 and 1343 (supervisors could identify which employees accepted union literature); *Kenworth Truck Co.*, 327 NLRB 497, 501 (1999) (supervisor observed union distributing handbills for an hour until left premises); *Impact Industries*, 285 NLRB 5 fn 2 (1987) (employer engaged in continuous scrutiny of employee activity over a substantial period of time); *Arrow Automotive Industries*, 258 NLRB 860, 861

²⁴ The Petition was filed on June 19.

²⁵ At times, the site supervisor was not present.

(1981) (11 supervisors observed employees' involvement with union handbillers; Board finds presence of so many supervisors highly unusual and presence was "deliberately calculated to show and demonstrate observation in numbers and forces").²⁶

5 My findings above that the presence of multiple supervisors at sites was "out of the ordinary" applies only to Greaves, Sawyer and other supervisors not regularly assigned to the particular sites. It does not apply to the site supervisors, such as Cohen and Felz, who the evidence discloses, regularly observe the conduct of the employees at their particular sites and spend most of their time observing the employees under their supervision, including for the
10 entire shift changes.²⁷ Therefore, since the conduct of Felz, Cohen and other site supervisors at their own sites was not "out of the ordinary" when they observed employees interacting with the union representatives, even for the entire shift change, that conduct is not unlawful.²⁸

15 Respondent's only justification for its conduct²⁹ is its assertion based on Greaves' testimony that the prolonged observation of their supervisors was necessitated by its desire to protect service. In that regard, Greaves testified that the union representatives would at times speak to employees, who were "on the clock" and was preventing the employees from changing their status and to report to their CSLs. I find this purported defense to be pretextual and far from sufficient to justify Respondent's conduct.

20 While there is some record evidence that at times some union representatives would attempt to speak with employees while they were "on the clock," there is little persuasive evidence that Respondent's service was being affected. Indeed, the testimony of Felz, Cohen and Boyd, Respondent's supervisors, who testified, contradicted Greaves' testimony to the
25 extent that it attempts to justify the presence of multiple supervisors, including Greaves and Sawyer, in order to assure that Respondent's service was not disrupted. These supervisors testified that although they called Greaves to notify her of the Union's presence, they did not request her assistance in dealing with the problem. The supervisors testified that they were able to handle the problem themselves and that they did so by approaching the employees,
30 determining their status and ordering the employees to go to their CSL, if required. Therefore, no justification has been established for the presence of multiple supervisors, including Greaves and Sawyer, to observe the employees' interacting with the union representatives for the entire shift change period.

35 Greaves' own testimony in this respect is quite telling. She testified that "employees react differently when they see me." This is precisely the effect that I believe Respondent

40 ²⁶ Although a showing that employees were actually coerced, is not necessary. I do note that a number of employees commented to the union representatives that they felt intimidated and/or were afraid to talk to the Union while the multiple supervisors were watching. Other employees informed the union representatives that they were surprised to see so many supervisors at the same place. *Kenworth Truck*, supra at 501 fn. 25.

²⁷ This is unlike Hall, who as I have found above, did not regularly observe the employees under his supervision for the entire shift change or for as much as two hours at a time.

45 ²⁸ As noted, I have found that some site supervisors went to other sites, along with Greaves and Sawyer, to observe employees interacting with union representatives. In such situations, which is "out of the ordinary" for the site supervisors, this conduct is also unlawful surveillance.

50 ²⁹ Respondent's primary defense, which I have rejected based on credibility grounds, is that the conduct of Greaves, Sawyer and the other supervisors was not "out of the ordinary" since their conduct *vis a vis* observing employees and their presence was no different than before the Union began organizing.

intended by its conduct of Greaves, Sawyer and other non-site supervisors observing them interacting with the union representatives for prolonged periods of time. It was designed to intimidate employees and discourage them from engaging in protected conduct and “deliberately calculated to show and demonstrate observation in numbers and force.” *Arrow Automotive*, supra 258 NLRB at 861; *Kenworth Truck*, supra, 327 NLRB at 501. In reaching this conclusion, I also find that Respondent concedes that Greaves as well as other supervisors were handing out anti-union literature to employees at the same times that the Union was talking to them and distributing pro-union literature to them. This demonstrates that Greaves’ alleged concern with “disruption of service” is not persuasive since distributing anti-union literature to employees has the same tendency to disrupt service as does the employees’ receipt of pro-union literature.

I also rely upon in making these findings on Respondent’s conduct on May 14 at Mt. Sinai involving Hall. As I found above, Greaves instructed Hall to observe employees at the site talking to the union representatives and see which employees were speaking to the union representatives. After Hall complied with these instructions and the union representatives left the site, Greaves and Sawyer arrived. Hall reported to them which employees he had seen talking to the Union and which employees had accepted union literature. Greaves told Hall to redo his spreadsheet³⁰ based on what he saw. Thus, this fact is consistent with my conclusion that Respondent’s prolonged observation by multiple supervisors of the interactions of its employees with the Union was intended to intimidate and discourage their union activities as well as to determine the union sympathies of its employees based on these observations.

Finally, while I agree with Respondent that it has a legitimate interest in making sure that its service is not disrupted, I find that its actions went far beyond what was necessary to accomplish this end. *Arrow Automotive*, supra 258 NLRB at 861. Thus, as I detailed above, Respondent’s site supervisors were perfectly capable of assuring that service was not disrupted, and in fact, did so without the necessity of the presence of Greaves, Sawyer or the other supervisors from other hospitals.

Accordingly, I conclude that Respondent has violated Section 8(a)(1) of the Act by engaging in surveillance of its employees’ union activities. *Sprain Brook Manor*, supra; *Nashville Plastics*, supra; *Carry Cos.*, supra; *Arrow Automotive*, supra.

To the extent that I have found that Respondent engaged in similar conduct subsequent to June 19, I shall deal with that conduct in the objections portion of my analysis. I shall not make any unfair practice findings concerning such post-petition conduct. General Counsel declined to amend the Complaint in that regard and does not seek unfair labor findings based on post-petition conduct.

The Complaint alleges, and General Counsel asserts, that Respondent by Greaves, Boyd and Cohen at Beth Israel engaged in surveillance of employees engaged in union activities by “following and speaking with employees while they were engaged in union activities.” These allegations are based on the testimony of Sandberg-Bernard and Levy.

General Counsel relies on Sandberg-Bernard’s direct testimony that “unspecified” supervisors would physically stand next to her as she was talking to employees or “insert

³⁰ Respondent’s witnesses, including Greaves, admitted that its supervisors were instructed to fill out a spreadsheet consisting of the supervisor’s opinions *vis a vis* the union preference of its employees.

themselves physically between myself and an employee” as well as her testimony that Boyd “would physically insert herself between myself and an employee on numerous occasions.”

However, when pressed on cross-examination, Sandberg-Bernard changed the above testimony and conceded that she recalled only two incidents, where these alleged interferences with her discussions with employees had occurred. They were on June 3 and 4. I therefore reject Sandberg-Bernard’s generalized, vague testimony of unspecified incidents, where supervisors, including Boyd, had allegedly physically inserted themselves between her and employees while she was attempting to organize.

With respect to the June 3 incident, I found Boyd’s testimony to be more detailed and credible, and I credit her version. This testimony establishes that Boyd had instructed employees, Mike and Ali, to go to their CSL after having fixed their radio mike. Ten minutes later, Boyd noticed that the ambulance was still there and that the employees had not complied with her instructions to go to their CSL. Boyd then went back to the ambulance and noticed Sandberg-Bernard talking to the employees. Boyd informed the employees that she had previously told them to go to their CSL and repeated these instructions. One of the employees replied, “Oh, we were speaking to her,” referring to Sandberg-Bernard. Boyd responded that is not a problem but the employees could speak to her at their CSL, adding “You can speak to her all you want but you need to go to where the fire department requested that we go.” The employees then left to go to their CSL as Boyd had instructed.

I find nothing unlawful in Boyd’s conduct during this incident. Boyd had a legitimate purpose in approaching the employees while they were talking to Sandberg-Bernard. The employees had ignored Boyd’s previous instructions to them to report to their CSL, and Boyd was acting in furtherance of her supervisory responsibilities when she ordered them to report to their CSL. The fact that they were talking to the union representative is not an excuse for them to fail to comply with legitimate supervisory instructions. I find that Respondent did not engage in surveillance or any other unlawful activity by Boyd’s activity. *Eagle-Picher Industries*, 331 NLRB 169, 182 (2000); *WestPac Electric*, 321 NLRB 1322, 1380-1381 (1996).

On June 4, Sandberg-Bernard was speaking to employee, John Henderson, who was known to be strongly anti-union. As they were talking, Greaves and Sawyer arrived. Henderson went over to them and asked, “What are you guys doing here?” Greaves replied, in a joking manner, “Oh, we are here to bust the Union.” I credit Sandberg-Bernard’s testimony concerning this incident, but I do not find any specific violations by Respondent concerning Greaves’ conduct. I note that the Complaint does not allege, nor does General Counsel contend, that Greaves’ comment that she and Sawyer were there “to bust the Union” is unlawful. I therefore shall not decide whether or not Greaves’ comments are unlawful.³¹ I do rely on Henderson’s questioning of Greaves and Sawyer as to “what are they doing here” as supportive of my conclusions, described above, that their presence at the hospital was “out of the ordinary.”

However, this incident did not establish any surveillance by Greaves or Sawyer. When they arrived at the hospital, Henderson approached them and they had the conversation described above. Sandberg-Bernard provided no testimony as to how long Greaves and Sawyer remained at the hospital on that day or that they did any “observing” of any union activities on

³¹ I do, however, find that the comment is supportive of my findings, detailed above, that the purpose of Respondent’s decision to have multiple supervisors, including Greaves and Sawyer, observe interactions between employees and the Union was meant to intimidate employees and to discourage them from engaging in union activities.

that day. I therefore recommend dismissal of the Complaint allegations as it pertains to Greaves' conduct on June 4.

Levy furnished general and unspecific testimony without providing dates or details that at Beth Israel, Cohen "as soon as she would see me she would jump out of her vehicle...and would come with her shoulder, and like, put it in front of me, and insert herself in front of me in the middle of a conversation."

Levy then immediately testified to a specific incident in August or September involving Cohen and two employees. This incident will be considered below in the objections portion of this decision.

However, I decline to make any findings *vis a vis* Levy's generalized and undetailed testimony that Cohen would "insert herself in front of me in the middle of a conversation" between himself and employees. I find such testimony insufficient to warrant an unfair labor practice finding absent more details as to the date or specifics as to what precisely occurred during these alleged incidents.

Later on his testimony while being examined by Petitioner's attorney, Levy did testify concerning a specific incident at Beth Israel and Cohen. While Levy did not testify as to the date of this incident, it was furnished after Petitioner asked him about pre-petition incidents, so I find that it occurred prior to June 19 and that it is appropriate to consider it as a possible unfair labor practice. Levy was speaking to employees, Maddis Grazzard and her partner, fifteen minutes before their shift was to end. Cohen approached the ambulance, got between Levy and the employees, instructed the employees to go to their CSL. Grazzard responded that the employees were off in fifteen minutes. Cohen replied, "I don't care. You have to go to your 89." The employees left the hospital and in fact received a call for another job on the way to their CSL.

I find nothing unlawful in Cohen's conduct during this incident described above. Cohen had a legitimate purpose in interrupting Levy's conversation with the two employees. They were still on the clock and fire department policy requires them to report to their CSL even though the employees had only 15 minutes left on their shift. Accordingly, I find that Cohen did not engage in surveillance of union activities or engage in any other unlawful conduct during this incident. *Eagle-Picher Industries*, supra; *WestPac Electric*, supra.

The final pre-petition incident occurred at Jacobi Hospital on June 1.³² Greaves received a call from employee, Letticia Rivera, who was at Jacobi Hospital, and complained to Greaves that she was tired of being "berated" by the union representatives and was "sick and tired" of telling them that she was not interested. Greaves told Rivera that she was on her way.

By the time Greaves and Sawyer arrived at Jacobi, Rivera's unit had received a call and was leaving the hospital. However, Greaves noticed another TransCare ambulance from Montefiore Hospital parked in the ER bay. No one was in the ambulance. Greaves ascertained that the employees had been at the hospital for 28 minutes. Greaves observed Levy and Ortega speaking to employees from a different employer, who were also at the hospital at the time.

³² While Levy placed this incident in August or September, I have found based on the credible testimony of Greaves, corroborated by Ortega, the Union's witness, that it occurred on June 1.

A few minutes later, the two TransCare employees came out of the hospital. They were in the ambulance. One employee was working on paperwork and the other was making up the truck. Ortega and Levy approached the ambulance and began conversing with the employees. Five minutes later, the employees were outside the ambulance talking to Levy and Ortega. At that point, Greaves came over to the ambulance, told the employees that they had been there too long and that they had to go to their CSL. Greaves also addressed Levy and Ortega and criticized them for affecting Respondent's service. Both Ortega and Levy questioned Greaves' assertion that they were affecting service. Greaves replied that the employees were talking to the union representatives and they need to go into service. The employees entered the ambulance and left the hospital as instructed.

Similar to the previously discussed incidents involving Boyd and Cohen, I conclude that Greaves did not unlawfully interfere with the Union or engage in surveillance during this incident. The employees had finished their paperwork and other tasks, and instead of leaving for their CSLs as they were required to do, they were talking to the union representatives. Greaves was clearly correct that Respondent's service was being affected by the employees talking to the Union and that she had a legitimate right to order the employees to go to their CSL, and to chastise the union representatives for affecting Respondent's service. Accordingly, I find that Respondent did not engage in any unlawful activity during this incident. *Eagle-Picher Industries*, supra; *WestPac Electric*, supra.

X. Analysis The Alleged Objectionable Conduct

A. Objection A.1

This objection makes reference to the Complaint issued by the Region alleging "unlawful surveillance" and asserts that "the Employer's illegal activity continued throughout the campaign and election. After the Complaint issued and immediately prior to the election, TransCare supervisors continued closely to monitor and intimidate employees, who attempted to speak with the Union, by coming into areas they did not normally frequent when employees were speaking with union representatives."

The Report of the Acting Director, consolidating this objection with the complaint allegations, noted that the Petitioner had not in its offer of proof set forth any evidence in support of this objection and that the independent investigation did not uncover any such evidence. However, the Report cited *Dresser Industries*, 242 NLRB 74 (1979) for the proposition that the *Ideal Electric and Manufacturing Co.*, 134 NLRB 1275 (1961) rule that the Board generally does not consider pre-petition conduct to set aside an election, "does not preclude consideration of conduct occurring before the petition is filed...where such conduct adds meaning and dimension to related post-petition conduct."

The Report also noted that the Complaint sets forth conduct occurring shortly before the critical period and possibly (if the dates presently unknown in June were on or after June 19) within the critical period. The conduct alleged in the Complaint could "add meaning and dimension to related post-petition conduct." Therefore, the Report directed that Objection A.1 be consolidated for hearing with the Complaint herein (as well as with several other objections).

On the third day of the hearing, after most of the testimony of the witnesses called by General Counsel and Petitioner had been completed, Respondent moved to strike all testimony concerning the conduct of supervisors not mentioned in the Complaint, as well as evidence concerning post-petition evidence concerning the surveillance allegations. In Respondent's

view, the Acting Director's Report consolidated this objection with the Complaint, and since the Report stated that Petitioner had not submitted any evidence in support of this objection that the testimony in question must be stricken. Respondent added that the Complaint makes no reference to any post-petition conduct and that it names only supervisors, Cohen, Greaves and Boyd, as having engaged in surveillance at Beth Israel Hospital. He also noted that testimony had been adduced concerning conduct of a number of supervisors, who were not named in the Complaint or in the Objections, and who the attorney had not met with.

I denied the Motion to Strike stating that I would consider the issues raised by Respondent in my decision.

Respondent, at that point, requested a continuance in order to prepare its defense and to speak with these additional supervisors. I denied that motion, but stated that Respondent could renew it when cross-examination of the last witness for General Counsel and Petitioner was completed. I added, however, that my initial reaction would be not to grant a continuance since Respondent was admittedly aware that the conduct of some supervisors (Greaves, Sawyer, Boyd, Cohen and Felz) were in issue and should, at least, be prepared to call these witnesses. I also stated that after these witnesses testify, if Respondent needs time to meet with and prepare the unnamed supervisors, I would consider a motion for a continuance and "probably would grant additional time."

After the completing of cross-examination of the last witness for General Counsel and Petitioner, General Counsel stated that it did not intend to amend the Complaint to include any post-petition conduct or to specifically name other supervisors. At that point, Respondent renewed its motion, which I again denied repeating my prior ruling that I would decide the issue in my decision.

Respondent called Greaves, Cohen, Felz and Boyd as witnesses, but not any of the supervisors, who had according to the testimony of General Counsel and Petitioner's witnesses had been involved in alleged surveillance at various hospitals. Respondent rested its case on the last day of the hearing and made no request for a continuance to speak to and prepare the additional supervisors, whom it did not call as witnesses as I suggested it could do.

Respondent renewed its motion in its brief, asserting that I am without jurisdiction to decide any allegations of unlawful conduct, unfair labor practices or objections that were not specified in the Complaint, including supervisors or events not included in the Complaint relative to this objection. *Sara-Lee d/b/a International Baking Co.*, 348 NLRB 1133 (2006); *Lee Deane Products Inc.*, 181 NLRB 1047, 1048 (1970); *Local 25, Bakery & Confection Workers Union*, 116 NLRB 290, 296 (1956). I do not agree.

In my view, both the Objections Report and the events at the hearing provided Respondent with adequate notice that post-petition surveillance activity at various sites, including the conduct of supervisors not named in the Complaint were in issue, and that these issues were fully litigated. I note that the Petitioner's Objections clearly states that after the filing of the petition, Respondent continued to engage in the conduct alleged in the Complaint of surveillance. More specifically, Petitioner asserts that Respondent continued its practice of its supervisors closely monitoring employees speaking to union representatives "by coming into areas that did not normally frequent when employees were speaking to union representatives."

Respondent is correct that the Objections Report did state that Petitioner had not adduced any evidence of post-petition conduct relative to this objection. However, Respondent conveniently ignores that fact that the Report did send this objection to hearing to be

consolidated with the unfair practice allegations based in part on *Dresser Industries*, supra.³³ Thus, the Report does put Respondent on notice that evidence of “related post-petition” conduct was likely to be adduced by Petitioner at the hearing.

5 It is correct as Respondent asserts, that the Complaint makes no mention of several supervisors while testimony was adduced that these supervisors (along with Greaves and Sawyer) would appear at various sites, where they were not regularly assigned and observe employees speaking to union representatives for prolonged periods of time, often until the union officials left the site. However, I also note that the Complaint does not name any specific
10 supervisors as engaging in this particular surveillance conduct, i.e. “increasing supervision of its employees.”

Thus, since the Complaint failed to name specific supervisors involved in this conduct, Respondent should have been aware that unnamed supervisors could be alleged as having
15 been involved in objectionable post-petition conduct. More importantly, Respondent was clearly made aware during the hearing that the conduct of these unnamed supervisors (in the Complaint) was in issue. Witnesses testified that these non-site supervisors were part of a group of multiple supervisors, who along with Greaves and Sawyer,³⁴ would appear at various sites both before and after the petition and observe Respondent’s employees speaking to the
20 union representatives. Indeed, Respondent moved to strike the testimony of the witnesses pertaining to the conduct of these supervisors because they were not named in the Complaint. This request was denied, but Respondent was provided with the option of requesting a postponement if it needed extra time to prepare and call these witnesses. Respondent chose not to pursue that option instead relying on its position, which I have rejected, that I am
25 precluded from considering such evidence based on the Acting Director’s Report.

I also note that while the complaint allegation regarding the conduct involved did not name any supervisors as committing such acts, it did name Greaves and Sawyer as supervisors and agents of Respondent.

30 While Respondent did present Greaves as a witness to testify, and she did provide testimony concerning this conduct, it did not call Sawyer as a witness.

Accordingly, based on the above facts, I conclude that Respondent had adequate notice
35 that the allegations of post-petition conduct relative to Objection A.1, including supervisors not named in the Complaint, were in issue and that the conduct involved was fully litigated. *Virginia Concrete Corp.*, 334 NLRB 796, 797 (2001); *Fiber Industries*, 267 NLRB 840 fn. 2, 856 (1983) (complaint did not allege specific supervisors as having violated the Act or indeed any allegation involving that supervisor or even concerning the alleged threat of plant closure; judge
40 considered allegation in deciding objections consolidated with unfair labor practice complaint since it was “fully litigated”); *Yellow Ambulance*, supra, 342 NLRB at 824; *Yale New Haven Hospital*, supra, 309 NLRB 363-369.

Therefore, I reject Respondent’s Motion to Strike the testimony in question and find it
45 appropriate to consider the evidence presented of post-petition conduct relative to this objection,

³³ Pre-petition conduct can be considered if it adds meaning and dimension to related post-petition conduct.

50 ³⁴ I note that Greaves and Sawyer were both named in the Complaint as supervisors and agents of Respondent.

including the conduct of supervisors not named in the Complaint.³⁵

Turning to the merits of this objection, I have found above in considering the pre-petition conduct of Respondent that the conduct of its supervisors, including and particularly Greaves and Sawyer of suddenly appearing at sites shortly after the Union appeared and observing the interaction of employees with the Union for prolonged periods of time, was “out of the ordinary” and was unlawful since Respondent had not adduced sufficient evidence of adequate justification for this conduct. *Sprain Brook Manor*, supra, 351 NLRB at 1191; *Carry Cos. of Illinois*, supra, 311 NLRB at 1073; *Nashville Plastics*, supra, 313 NLRB at 464; *PartyLite Worldwide*, supra 344 NLRB at 1343; *Kenworth Truck*, supra 327 NLRB at 501; *Impact Industries*, 285 NLRB at 5; *Arrow Automotive Industries*, supra, 258 NLRB 861. See also *Villa Maria Nursing*, 335 NLRB 1345, 1353 (2001) (increase in the number of security personnel observing leafleting not justified and found to be “intended to intimidate employees engaging in protected and union activities”).

I found above that similar conduct continued after the petition was filed, and I, therefore, conclude that objectionable conduct had been established. I find it appropriate to apply the principles espoused in *Dresser Industries*, supra, 242 NLRB at 74-75, which have been utilized in numerous subsequent cases, *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004); *Yuma Coca-Cola Bottling Co.*, 339 NLRB 67, 68-69 (2003); *National League of Professional Baseball Clubs*, 330 NLRB 670, 676 (2000). That is while *Ideal Electric Mfg. Co.*, 134 NLRB 1275, 1278 (1961) precludes setting aside an election based on pre-petition conduct, it is permissible to consider pre-petition conduct where it “adds meaning and dimension to related post-petition conduct.” *Dresser Industries*, supra, *Cedars-Sinai Medical Center*, supra.

Here, the conduct of TransCare pre- and post-petition was virtually identical in its practice of having multiple supervisors, including Greaves and Sawyer, appear at sites, where the Union was organizing and observing employees interacting with union representatives, including accepting union literature, for substantial periods of time, sometimes for up to three hours. This “out of the ordinary” conduct is both violative of Section 8(a)(1) of the Act (pre-petition) and constitutes objectionable conduct (post-petition).

It is appropriate to, and I do rely upon the identical pre-petition conduct of Respondent, to “add meaning” to its identical post-petition conduct. I also rely on my findings based on Hall’s testimony that at a meeting in April, Greaves instructed Respondent’s supervisors to observe employees when they speak to union representatives and that the supervisors should fill out

³⁵ The cases cited by Respondent, *International Baking*, supra; *Local 25, Bakery Union*, supra and *Lee Deane Products*, supra are inapposite. They are all unfair labor practice cases, where based on due process grounds, the Board found that various issues were not fully litigated because the respondents therein were unaware at any point during the hearing that the issues involved (particular supervisor’s conduct – *International Baking*, allegation of unlawfully inducing employees of particular employees – *Local 25, Bakery* and allegation of surface bargaining – *Lee Deane*, would be considered).

Here, in contrast, Respondent was made aware during the hearing that the conduct of its supervisors not named in the Complaint was in issue, particularly *vis a vis* the objections as well as the fact that post-petition incidents of increased supervision was being litigated. Respondent was given an option of requesting an adjournment if it needed time to prepare and call the unnamed supervisors as witnesses. Yet, it did not choose to make such a request. In these circumstances, Respondent was not deprived on due process by virtue of having these issues considered and the conduct of these supervisors was fully litigated.

their “spreadsheets” of their perceptions of the union sympathies of its employees based in part on these observations of how long supervisors observed employees talking with their union representatives. Further, after Hall did in fact observe employees talking to union representatives at Mt. Sinai, in his case “out of the ordinary” behavior for the entire shift change, Greaves instructed Hall to redo his spreadsheet based on his observations of which employees had spoken to and/or received literature from union representatives.

This evidence fortifies the conclusion that I have made that both the pre- and post-petition conduct of Greaves, Sawyer and the other supervisors, who observed employees at sites other than their own, was unlawfully motivated and not primarily based on TransCare’s desire to assure that service was not disrupted. I find as I did with respect to the pre-petition conduct that although TransCare has a legitimate interest in making sure that its service is not disrupted, its actions here went far beyond what was necessary to accomplish this end. *Arrow Automotive*, supra, 258 NLRB at 861. As detailed above, Respondent’s site supervisors were perfectly capable of assuring that service was not disrupted, and in fact, did so without the necessity to have Greaves, Sawyer and other supervisors from other hospital standing around and observing the employees interacting with the Union for prolonged periods of time.

I conclude that Respondent’s post-petition conduct, as detailed above, constitutes conduct that interfered with the election and warrants a finding that the election be set aside. *PartyLite Worldwide*, supra, 344 NLRB at 1342, 1343 (election set aside based upon three instances of “out of the ordinary” conduct of a number of supervisors’ observation of union activities of its employees); *Villa Maria Nursing*, supra, 335 NLRB at 1346, 1355; *Woodland Molded Plastics Corp.*, 250 NLRB 169, 176 (1980) (objection set aside based on two instances of one official of employer observing employees interacting with union representatives for fifteen minutes on each occasion).

My conclusion that Respondent’s conduct warrants the setting aside of the election would not change even if I agreed with Respondent’s contention that it is not appropriate to consider the conduct of supervisors not named in the unfair labor practice complaint in the Objections Decision. Thus, even without considering the presence of the site supervisors from other sites, the record establishes Greaves and Sawyer, two high level supervisors, who were named as agents in the unfair labor practice complaint, were present on numerous occasions post-petition at various sites and observed employees’ interactions with the union representatives for as much as three hours at a time or until the union representatives left the sites. See *PartyLite Worldwide*, supra relying in part on “out of the ordinary” presence of two high level supervisors of employer, who observed employees interacting with union representatives on three occasions for 15 minutes each time. Accord, *Woodland Molded Plastics*, supra.

Here, the conduct of Greaves and Sawyer is much more pervasive than the conduct of the supervisors in *PartyLite Worldwide* and *Woodland Molded Plastics* since they observed union activities, including receipt of union literature on numerous occasions at several sites and often for up to three hours at a time or until the union representatives left the particular site.

Accordingly, I recommend based on the above described conduct that Objection A.1 be sustained. *PartyLite Worldwide*, supra; *Woodland Molded Plastics*, supra.

Levy testified about three specific incidents, which occurred within the critical period, which Petitioner asserts, represents additional instances of unlawful surveillance and objectionable conduct.

In late July, Levy went to Mt. Sinai Hospital. When he arrived, he said hello to Site Supervisor Escoto. She returned his hello. Shortly after he began to talk to employees, several supervisors from other sites arrived, plus Greaves and Sawyer. They stood along with Escoto 15 feet away from Levy and observed the employees. Some employees told Levy that they did not feel comfortable talking with the Union while the supervisors were watching. Levy remained at the site until shortly before shift change ended.

None of the supervisors approached Levy while he was talking to the employees nor made any efforts to interfere with his discussions.

I find that this incident is little different than my prior findings, detailed above, that on numerous occasions non-site supervisors, plus Greaves and Sawyer, would appear shortly after the union representatives began discussions with employees and observe the employee' interactions with the Union until the union representatives left. Thus, this incident is merely corroboration of my prior findings, but more specific as to the date and site. To the extent that Greaves and Sawyer and other non-site supervisors present³⁶ observed the employees talking to Levy, it is a specific instance of unlawful surveillance and objectionable conduct.

To the extent that Petitioner asserts that Escoto's conduct is also violative of the Act and objectionable, I disagree. Petitioner had not shown that Escoto's conduct at the site was "out of the ordinary." The record does disclose that most site supervisors (other than Hall) regularly observe Respondent's employees, including during shift changes. Just as I did not find the conduct of Cohen and Felz of observing the employees under their supervision to be "out of the ordinary," I find similarly with respect to Escoto. I therefore do not find Escoto's conduct to be objectionable.

Levy also testified to an incident at Beth Israel Hospital in late August or early September. Employees, Barbara Williams and Dawn ---, were in the process of checking out the ambulance to make sure it was equipped and ready for use. Levy approached the ambulance and began discussing the Union's health benefits. A minute or two later, Cohen came over, inserted herself between Levy and the employees and asked the employees "How's your morning going?" and continued "small talk" with them about their weekend for three minutes. Cohen then got into the ambulance and sat in the front seat and continued the "small talk" with the employees for two more minutes. Levy offered to buy coffee for the employees and for Cohen, but all three individuals declined Levy's offer. Levy then said, "It looks like we're done here" and left the ambulance and the facility.³⁷

I conclude that Cohen's conduct during this incident constitutes a separate instance of objectionable conduct. While Cohen as the site supervisor could lawfully have observed the discussions from a reasonable distance or approached the employees for work related reasons, such as informing them to go to their CSL, she did neither. Rather Cohen approached the employees, inserted herself between Levy and the employees and began to engage in "small talk." She then entered the vehicle and continued to engage in "small talk" with the employees. I find that evidence demonstrates that Cohen approached the employees for the purpose of

³⁶ One of the non-site supervisors present was McMahon.

³⁷ My findings with respect to this incident are based on the credited testimony of Levy. His testimony was detailed and believable. Cohen did not dispute Levy's testimony, but claims that she got into the vehicle because she was "assisting" the employees in switching vehicles. I do not credit Cohen's testimony in this regard, in the absence of any details as to how she was allegedly assisting the employees in switching vehicles.

disrupting the discussion between Levy and the employees. Such conduct is unlawful and therefore objectionable. *Grass Valley Grocery Outlet*, 338 NLRB 877, 881 (2003) (supervisors approached union representatives talking to employees and stood there until representatives left; absence a lawful business reason for such conduct, judge affirmed by Board finds that managers approached group for purpose of disrupting the discussion in violation of Section 8(a)(1) of the Act). See also *Loudon Steel Inc.*, 340 NLRB 307, 313 (2003) (conduct of manager in walking within a few feet of employees' vehicles approaching handbillers gave impression to employees that he was determining who was accepting handbills in violation of Section 8(a)(1) of the Act.)

While I do not and cannot find that Respondent committed an unfair labor practice by such conduct in the absence of an amendment to the Complaint by General Counsel, I can and do find that Cohen's conduct constitutes a separate instance of objectionable conduct.

Finally, Levy testified to an incident in September at Jacobi Hospital. Levy and Ortega were there in the hopes that TransCare employees would appear. However, there were no TransCare employees present when Greaves and Key drove up separately in their personal vehicles. They both got out of their cars. Levy made a gesture like he was looking under his car and said to Key and Greaves, "What do you have, some kind of tracking device on our car and you go wherever we go?" Neither Key nor Greaves responded to Levy's statement.

Even though, Respondent provided no testimony as to why either Greaves or Key was at Jacobi Hospital on that day, I find nothing unlawful or objectionable about their conduct. Notably, no TransCare employees were present at the hospital at the time. Therefore, I find no basis for concluding that Respondent violated the Act or engaged in any objectionable conduct during this incident.

B. Objection A.7

This objection alleges as follows:

"The Employer prevented the Union from posting pro-union notices on bulletin boards, but allowed antiunion notices to be posted inside locked bulletin boards that were supposed to be only for employment-related notices and could only be opened by supervisors or managers."

Petitioner contends that the evidence supports its assertion that TransCare discriminatorily denied the use of its bulletin board to the Union while allowing anti-union literature to be posted on such bulletin boards, and such conduct warrants setting aside the election. *Allied Mechanical Inc.*, 343 NLRB 631, 640 (2004); *Waste Management Inc.*, 330 NLRB 634, 635-636 (2000). I disagree.

Contrary to Petitioner's contention, no such discriminatory denials of use of its bulletin boards have been established. I have not credited Flood's testimony that Greaves instructed him that he could not use Respondent's locked bulletin board to post union literature. There is no evidence that the Union ever requested or was denied the right to use this bulletin board. This finding is sufficient in itself to warrant the overruling of this objection. *Faurecia Exhaust System*, 353 NLRB 382, 390 (2008).

Petitioner also argues that TransCare acted discriminatorily and disparately by allowing "anti-union" postings in its locked bulletin boards. Once again, I do not agree.

Petitioner notes, in this regard, that TransCare posted a number of “anti-union” documents in these bulletin boards. Petitioner is correct in that assertion, as the evidence discloses, that TransCare posted in its locked bulletin boards literature that it also distributed to employees urging employees to vote no and including other statements that can be reasonably be construed as “anti-union.”

However, an employer is under no obligation to permit employees to use its bulletin boards to post pro-union materials or literature, even where the employer itself uses the same bulletin board to post its own anti-union messages. *Register Guard*, 351 NLRB 1110, 1114, 1118 (2007); *NLRB v. Steelworkers (NuTone)*, 357 U.S. 357, 363-364 (1958). Thus, even if the record established, which it does not, that TransCare did forbid the Union from using the bulletin boards while using their bulletin boards to post its own anti-union messages, no unlawful or objectionable conduct would be established. *Register Guard*, supra.

However, if the employer permits its employees to post anti-union messages while denying employees the right to post pro-union messages, this would constitute unlawful discrimination. *Register Guard*, supra at 1118.

Petitioner does contend that TransCare has violated these principles since it allegedly allowed the posting of anti-union literature by a “known” anti-union employee. In that regard, the evidence discloses that a document entitled, “TransCare EMT’s Personnel Meeting,” was posted in the locked bulletin board at Mt. Sinai Hospital. This document announced a meeting to discuss the “proposed union,” indicated the time and date and mentions that employees should contact Joe Pena if there are any questions.

Initially, I agree with Respondent that on its face this is not an “anti-union” document. It reflects no anti-union sentiments or any statements indicating that the meeting was to express anti-union positions. While employees may be aware that Pena was a “known anti-union” employee, as Petitioner asserts, that does not transform the announcement of the meeting into “anti-union” literature.

Further, even if it is appropriate to view the document as an announcement of an “anti-union” meeting due to Joe Pena’s apparent authorship of the document, I note that the evidence does not establish how the document was posted on the bulletin board. While the evidence establishes that only supervisors have keys to the bulletin board, that does not necessarily prove that a supervisor condoned or permitted the posting of the document. For example, the bulletin board could have been left unlocked inadvertently by a supervisor, allowing Pena or some other employee access to the bulletin board.

Furthermore, the evidence discloses that as soon as Greaves was notified that this document was posted on the bulletin board at Mt. Sinai, she immediately ordered the supervisor at Mt. Sinai to remove it since it was not a TransCare approved document.

Therefore, I conclude that in these circumstances a single instance of a posting of arguably anti-union literature at one site for a brief period of time is insufficient to establish discriminatory or disparate enforcement. There is no evidence that responsible company officials allowed “anti-union” items posted by employees after they had knowledge of the specific postings. *Wal-Mart Stores*, 340 NLRB 703, 709 (2003); *Miller Brewing Co.*, 311 NLRB 1364 fn. 2 (1993).

Accordingly, based on the foregoing, I recommend that Objection A.7 be overruled.

C. Objection A.3

This objection, as reflected in the Objections Report, asserts that TransCare supervisors
 5 on the day of the election at Brooklyn Hospital were standing in areas that voters had to pass on
 the way to the polling place.³⁸

The evidence at the hearing revealed, based on the undenied testimony of Ortega, that
 he arrived at Brooklyn Hospital on November 17, the first day of the manual election. He
 10 observed two supervisors of TransCare, Perlowitz and Rose, sitting in a TransCare vehicle in
 the ER bay. According to Ortega, employees would have to pass by the vehicle in order to enter
 the hospital in order to vote. Ortega asked Rose and Perlowitz to move, asserting that they were
 not supposed to be there. The supervisors refused to move, with Rose contending that “they”³⁹
 15 told company representatives that the supervisors could remain there. Ortega remained at the
 site for a few minutes and then left. Significantly, Ortega did not see any employees entering the
 hospital or passing by the vehicle. It is also important that the election was conducted in the
 crew room inside the hospital. Ortega conceded that the crew room could not be seen by the
 supervisors sitting in the car.

Ortega returned to Brooklyn Hospital later on that morning. At that time, Rose and
 20 Perlowitz had moved the vehicle to the street in front of the ER. From this vantage point, the
 supervisors could see which employees enter the hospital, but employees would not necessarily
 have to pass by the TransCare vehicle in order to enter the hospital. Once more, Ortega
 remained at the hospital for a few minutes, and once again, he did not see any employees
 25 entering the facility during his second visit. On the second day of voting, November 18, Ortega
 went to Brooklyn Hospital toward the end of the closing of the polls as well as in the morning.
 Similar to his second visit on November 17, Ortega did not see any employees entering the
 hospital on November 18.

While in some circumstances objectionable conduct has been found, where during
 30 polling, supervisors stationed themselves so that employees had to pass by them on their way
 to vote, *Performance Measurements Co. Inc.*, 148 NLRB 1657, 1659 (1964); *Electric Hose and
 Rubber Co.*, 262 NLRB 186, 216 (1982); *ITT Automotive*, 324 NLRB 609, 623-625 (1997), enf.
 in pert. part 188 F.3d 375, 387 (6th Cir. 1999), the facts here do not come close to establishing
 35 such a conclusion.

Thus, while on the first day of the voting, Perlowitz and Rose were for some brief period
 in the ER bay, where employees would have “had to pass” to enter the hospital in order to reach
 40 the polling place, there is no evidence that any employee entered the facility during this period
 of time.

When Ortega returned later in the day, Perlowitz and Rose had moved their vehicle to
 the street, where Ortega conceded employees would not have had to pass by the vehicle in

³⁸ As noted above, Petitioner also alleged in its objections that similarly objectionable
 conduct occurred at Beth Israel, Mt. Sinai and Montefiore Hospitals. The Acting Director
 overruled the portion of the objections relating to these sites. Petitioner requested a review, and
 the Board agreed with Petitioner and concluded that a hearing was warranted on these issues
 as well. However, Petitioner subsequently requested withdrawal of these allegations, which was
 50 approved by the Region.

³⁹ Rose did not identify the source of this information allegedly conveyed to her.

order to enter the hospital. The same situation occurred the next day, where again Rose and Perlowitz were stationed on the street and not where employees had to pass in order to enter the facility.

5 Thus, Petitioner has failed to establish that any employee “had to” pass by TransCare supervisors while they were entering the hospital in order to vote. Moreover, it is undisputed that the supervisors could not on either day observe employees entering the actual polling area in the crew room inside the hospital. *J.P. Mascaro & Sons*, 345 NLRB 637, 639, 640 (2005).

10 Accordingly, I recommend that Objection A.3 be overruled. *J.P. Mascaro*, supra.

Conclusions of Law

15 1. The Respondent, TransCare New York, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is and has been a labor organization within the meaning of the Act.

20 3. Respondent by creating the impression that its employees were under surveillance violated Section 8(a)(1) of the Act.

4. Respondent, on June 3 and 17, engaged in surveillance of union meetings attended by its employees in violation of Section 8(a)(1) of the Act.

25 5. Respondent, on numerous occasions in April and May, engaged in surveillance of the union activities of its employees in violation of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices affects commerce within the meaning of Section 2(6) and (7) of the Act.

30 7. Respondent, TransCare, engaged in conduct, which warrants that the election conducted in Case No. 29-RC-11762 be set aside.

Remedy

35 Having found that Respondent has violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes and policies of the Act.

40 I find it appropriate to recommend that Respondent be required to post a notice at its main office in Brooklyn, NY as well as at each of the nine hospitals in New York City, where it has been contracted to perform 911/EMS services.

45 Upon the foregoing findings of fact, conclusions of law the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended⁴⁰

50 ⁴⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, TransCare New York, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that the union activities of its employees are under surveillance.

(b) Engaging in surveillance of its employees' attendance at union meetings.

(c) Engaging in surveillance of its employees' discussions with union representatives, their receipt of union literature or their exercise of any protected concerted activities.

(d) In any like or related manner, interfering with restraining or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days after service by the Region, post at its place of business in Brooklyn, NY and at all hospitals, where it has been contracted to perform 911/EMS services, copies of the attached notice marked "Appendix."⁴¹ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case. No. 29-CA-11762 be set aside, and the case be severed and remanded to the Director for Region 29 for appropriate action.

Dated, Washington, D.C., October 20, 2010

Steven Fish,
Administrative Law Judge

⁴¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain on your behalf with your employer.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

WE WILL NOT create the impression that the union activities of our employees are under surveillance by us.

WE WILL NOT engage in surveillance of our employees' attendance at union meetings.

WE WILL NOT engage in surveillance of our employees' discussions with union representatives, their receipt of union literature or their exercise of any protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

TRANSCARE NEW YORK, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Two MetroTech Center, 100 Myrtle Avenue, Suite 5100

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.